IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1966

No. 430

JAMES SAILORS, et al.,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

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BRIEF FOR JAMES SAILORS, ET AL.

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MISCELLANEOUS

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OPINIONS BELOW

The majority and dissenting opinions of the District Court dated May 2, 1966, R. 198-222, are reported in 254 F. Supp. 17 (D.C.W.D. Mich. 1966).

JURISDICTION

The appellants brought suit[1] under 42 U.S.C. §§ 1981, 1983; 28 U.S.C. §§ 1331, 1343 seeking an injunction and declaratory relief restraining the enforcement, operation

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[1] A three judge District Court was convened pursuant to 28 U.S.C. § 2281.

and application of Section 294 of the Michigan School Code[2] on the grounds that they were being denied full and equal voting rights and full and equal representation in the election of members of the governing board of The Board of Education of the County of Kent, a school district under Michigan law exercising jurisdiction county wide, as secured by the provisions of the equal protection clause of the Fourteenth Amendment to the United States Constitution[3] (R. 1-88).

The order of the District Court dismissing the complaint was dated and entered May 2, 1966 (R. 223-224).

James Sailors, et al. filed their Notice of Appeal on June 16, 1966 (R. 224-225).

The order of the Supreme Court of the United States noting probable jurisdiction was dated and entered December 5, 1966, 87 S. Ct. 499 (R. 226).

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253.

The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Nixon v. Herndon*, 273 U.S. 536; *Smiley v. Holm*, 285 U.S. 355; *United States v. Classic*, 313 U.S. 299; *United States v. Saylor*, 322 U.S. 675; *Baker v. Carr*, 369 U.S. 186; *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533; *WMCA v. Lomenzo*, 377 U.S. 633; *Davis v. Mann*, 377 U.S. 678; *Roman v. Sincock*, 377 U.S. 695; *Lucas v. Colorado General Assembly*, 377 U.S. 713.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment XIV, Section 1, Constitution of the United States, is set forth in Appendix A at p. 1a.

2. 42 U.S.C. §§ 1981, 1983; 28 U.S.C. §§ 1331, 1343 are set forth in Appendix B at pp. 1a-2a.

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[2] C.L. Mich. '48 § 340.294, M.S.A. § 15.3294; Appendix C, p. 2a.

[3] See Appendix A, p. 1a.

3. Section 294 of the Michigan School Code (C.L. Mich. '48 § 340.294, M.S.A. § 15.3294) and 294a of the Michigan School Code (C.L. Mich. '48 § 340.294a, M.S.A. § 15.3294[1]) which replaced Section 294, initially sought to be invalidated, are set forth in Appendix C, at pp. 2a-5a.

QUESTION PRESENTED

> "The primary question is whether or not the guarantees of the equal protection clause of the Fourteenth Amendment to the Federal Constitution are extended to electors of local boards in the State of Michigan, which local boards elect intermediate (county) boards of education in accordance with a system paralleling the county-unit system invalidated by the Supreme Court in *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963)."

The appellants accept and adopt the foregoing statement by District Judge Fox, dissenting opinion (R. 210), and concurred in by Circuit Judge O'Sullivan and District Judge Kent, majority opinion (R. 220), as the question presented in this case.

STATEMENT OF THE CASE

The appellants, James Sailors, *et al.*, as citizens of the United States and the State of Michigan, and as qualified and registered electors of Kent County (R. 122) commenced suit in the United States District Court on February 15, 1963 (R. 1). Plaintiffs sought to enjoin the enforcement and operation of Section 294 of the Michigan School Code[4] pertaining to the county-unit system of electing county school board members. When Section 294a[5], which continued the county-unit device, replaced

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[4] Supra, footnote 2; Appendix C, p. 2a.

[5] C.L. Mich. '48, § 340.294a; M.S.A. § 15.3294(1), Appendix C, p. 4a.

Section 294 the plaintiffs also sought to invalidate Section 294a (R. 96).[6]

On June 4, 1964 the motion of William A. Duthler, *et al.*, resident electors of Kent County, Michigan, to intervene as party plaintiffs was granted by the District Court (R. 135). The complaint of intervening plaintiffs was filed on June 19, 1964 (R. 88).

The case was submitted to the three-judge panel on stipulated facts (R. 121-194).

Under Section 294 and its replacement 294a of the Michigan School Code, school board members for county school districts are elected by a Georgia-type county-unit system, which was struck down in *Gray v. Sanders, supra;*[7] specifically, school board members in each local school district within the county are elected at at-large elections to terms of three years, staggered so that the term of one or more board members expires each year. One school board member from each local school district within the county attends a biennial meeting called by the county superintendent of schools to elect and fill the seats of county school board members whose terms are expiring. There are five county school board members elected to staggered six year terms. Election is by majority vote of those present at the biennial election, with the representative of the people in each local school district having one vote irrespective of the number of people represented.[8] The federal census figures by school districts were not available except in the case of Grand Rapids where the boundaries were the same as that of the City of Grand Rapids. A special census was taken in four of the smaller districts. A tabulation is as follows (R. 163):

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[6] The amendment to the original complaint was apparently not made part of the Transcript of Record. It is set forth in Appendix D, pp. 5a-6a.

[7] As phrased by District Judge Fox: "This is essentially a unit system of voting — each school district within the county receives one vote in the election of each of the five members of the County Board." (R. 200)

[8] See Appendix C, p. 2a for the full text of this statutory county-unit vote system.

Local School District	Population	Vote	Population-Variance Ratio
Ashley (Gratton #6 Fractional)	145	1	1391 to 1
Boyd (Alpine #10)	191	1	1056 to 1
Hoag (Solon #8)	111	1	1818 to 1
Nelson Center (Nelson #6)	99	1	2038 to 1
Grand Rapids (Grand Rapids #1)	201,777	1	1 to 1
Kent County Total	363,187		

The 0-19 school census taken annually in each local school district illustrates the relative size population-wise of the 40 local school districts within Kent County in 1963 and the 39 local school districts in 1964. For a complete tabulation see R. 165 which shows a range in school census between 31 and 75,863 for 1963, and 32 and 76,395 for 1964.

The people in Grand Rapids constitute 55% of the population of the county (R. 84-86, 132) but have only 1/40th or 2½% of the voting power in electing county school board members. A voter in Nelson Center has 2,000 times the voting power of the voter in Grand Rapids (R. 132, 163). Based upon the 0-19 school census in 1963, 97.8% of the population of the county resided in the 19 larger school districts and the remaining 2% resided in the 21 smaller school districts and under the county-unit system referred to can control county school affairs (R. 133, 166). The malapportionment was even worse in 1964 (R. 166). The correlation between school census figures (ages 0-19) and actual population while not 100%[9] is good enough for purposes of deciding the constitutional issues

[9] The 1960 population figures show that 55.6% of the county's population resided within the School District of the City of Grand Rapids while an extension of the 1963 0-19 school census count would indicate that the total had dropped to 48% by 1963 (R. 133, 165). In Nelson Center actual count in 1963 indicated .027% of the county population resided within Nelson Center, whereas the 1963 0-19 school census would indicate a .035% figure (R. 163, 165).

raised in this case since in any event the population variance ratios in the neighborhood of 2000 to 1 are so great that no issue of "substantial equality" is presented.[10]

Appellants, below, sought to invalidate the county unit system and to enjoin all further elections thereunder and to require at-large election of county school board members on a one person one vote basis, or on the basis of apportioning unit votes in accordance with population (R. 9, 97).

The District Court by 2-1 vote denied the appellants any of the relief sought. The whole panel agreed that this case presented the question of applicability of *Gray v. Sanders, supra,* and *Reynolds v. Sims, supra, et al.,* to the local level of government. The majority opinion states:

> "The facts and issues in connection with this case are very ably set forth in the Opinion of Judge Fox (R. 220).
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> • • •
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> "The matter of malapportionment of boards and agencies of the states and their subsidiaries has not yet been before the United States Supreme Court" (R. 220).
>
> • • •
>
> "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guidelines for the selection of the many boards and commissions created and organized in connection with local government. We are satisfied that the Supreme Court of the United States has not yet reached that

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[10] *Reynolds v. Sims,* 377 U.S. 533, 577, 84 Sup. Ct. 1362, 1390:

> "• • • Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any citizen in the State."

point. We are satisfied that we should not anticipate that the Supreme Court will reach that point" (R. 221-222).

In contrast, the Honorable Noel P. Fox, District Judge, in dissent, answered the primary question as follows:

> "Under the authority of Reynolds and other decisions of the United States Supreme Court herein discussed, I can see no warrant to arbitrarily cut off the citizens' right to fair representation at the county level" (R. 214).

ARGUMENT

As heretofore stated in our Jurisdictional Statement, it is contended that a living, working democracy at the local level of government is just as vital and just as important as it is in the State House (*Baker v. Carr, supra, Reynolds v. Sims, supra*); and just as vital and just as important as it is in the election of state-wide office holders (*Gray v. Sanders, supra*); and furthermore, that "Today, education is perhaps the most important function of state and local governments." (*Brown v. Board of Education*, 347 U.S. 483, p. 493). We subscribe to the principle that a reversal in this case is not only important to appellants but is equally crucial to a functioning democracy at the local level of government and to education systems nationwide.[11]

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[11] Not only is education one of the most important functions of state and local governments, but numerically speaking the school board is the most common form of governmental unit in the United States. See *U. S. Advisory Commission on Inter-Governmental Relations, Performance of Urban Functions; Local and Area Wide* 78 (1963). In 1962 there were over 34,000 of these autonomous bodies, most of them popularly elected. (See U.S. Department of Commerce Bureau of the Census, 1965 Statistical Abstract of the United States 419.) See Note, 79 Harv. Law Rev. 1228 (1966) at 1275 where the author observes: "The electoral districts from which these (school) boards are chosen are often drawn to coincide with school attendance districts, so that the electoral districts often have neither equal numbers of inhabitants nor equal numbers of children. Probably no public issue arouses the interest of more municipal citizens than public education; heated battles over taxation and bond issues, consolidation of school districts, quality of education, and segregation indicate that any major shift in local school board policy will be opposed and defended vigorously."

Since the landmark decision of *Baker* the federal and state courts have been besieged with malapportionment cases involving local government. Almost all of the decided cases apply Baker, Gray and Reynolds to local government.[12] In Michigan the Supreme Court is deadlocked, waiting for an authoritative decision from this court.[13] The few additional cases refusing to apply, *Baker, et al*, to the local level of government are in the distinct minority.[14]

While it may have unique features, the county-unit system of electing county school board members in Michigan is essentially the same as the system condemned in

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[12] *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945 (D.C. Md. 1964) affirmed, 352 F2d 123 (4th Cir. 1965) (City Council); *Mauk v. Hofman*, 87 N.J. Super. 276, 209 A2d 150 (Super. Ct. of N.J., Ch. Div. 1965) (County Board of Freeholders); *Bianchi v. Griffing*, 217 F. Supp. 166, 238 F. Supp. 997 (D.C.E.D.N.Y. 1965), appeal dismissed, 382 U.S. 15 (1965) (County Board of Supervisors) *Goldstein v. Rockefeller*, 45 Misc. 2d 778, 257 N.Y.S. 2d 994 (Sup. Ct. 1965) (County Board of Supervisors); *Augostini v. Lasky*, 46 Misc. 2d 1058, 262 N.Y.S. 2d 594 (Sup. Ct. 1965) (County Board of Supervisors); *Shilbury v. Board of Supervisors*, 46 Misc. 2d 837, 260 N.Y.S. 2d 931 (Sup. Ct. 1965) (County Board of Supervisors); *Seaman v. Fedourich*, 262 N.Y.S. 2d 444, 16 N.Y. 2d 94 (Ct. of App. 1965) (Common Council); *Town of Greenburgh v. Board of Supervisors*, 49 Misc. 2d 116, 266 N.Y.S. 2d 998 (Sup. Ct. 1966) (County Board of Supervisors); Opinion of the Justices, 106 N.H. 233, 209 A2d 471 (1965) (Applying state legislation to ward boundaries) *State ex rel Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W. 2d 249 (1965) (County Board of Supervisors); *Delozier v. Tyrone Area School Board*, 247 F. Supp. 30 (D.C.W.D. Pa. 1965) (School Board); *Simmon v. Lafayette Parrish*, 226 F. Supp. 301 (D.C.W.D. La. 1964) (Police Jury-Parrish governing authority) (Defendant's motion to dismiss, denied); *Damon v. Lauderdale County Election Comm'rs.*, Civil No. 1197-E. (D.C.S.D. Miss. 1964) [Informal opinion reprinted in *National Municipal League, Court Decisions on Legislative Reapportionment*, Vol. 13, p. 139 (1965)] (County Board of Supervisors); *Miller v. Board of Supervisors*, 405 P2d 857, 46 Cal. Rptr. 617 (1965) (County Board of Supervisors applying state statute requiring equal population districting); *Graham v. Board of Supervisors*, 269 N.Y.S. 2d 477 (Sup. Ct. App. Div. 1966) appeal dismissed, 271 N.Y.S. 2d 295 (County Board of Supervisors); *Hanlon v. Towey*, 142 N.W. 2d 741 (Minn. 1966) (County Board of Commissioners); *Armentrout v. Schooler*, 409 S.W. 2d 138 (Sup. Ct. Mo., 1966) (City Council); *Strickland v. Burns*, 256 F. Supp. 824 (D.C.M.D. Tenn. 1966) (County School Commission); *Martinolich v. Dean*, 256 F. Supp. 612 (D.C.S.D. Miss. 1966) (County Supervisors); *Bailey v. Jones*, 139 N.W. 2d 285 (1966) (County Commissioners); *Montgomery County Council of Garrett*, 222 A 2d 164 (Md. Ct. App. 1966) (County Council).

[13] *Muskegon Prosecuting Attorney v. Klevering*, 377 Mich. 666 (1966); *Brouwer v. Kent County Clerk*, 377 Mich. 616 (1966).

[14] *Johnson v. Genesee County*, 232 F. Supp. 567 (D.C.E.D. Mich. 1964). The decision in *Johnson* is questionable because the District Judge was of the opinion that he was bound by the decision of the Supreme Court in *Tedesco v. Board of Supervisors of Elections*, 389 U.S. 940. Reliance on *Tedesco* would seem misplaced because there the plaintiffs sought to correct malapportionment of the city commission based upon the privileges and immunities clause of the 14th Amendment rather than the equal protection clause and because in *Tedesco* the

Gray v. Sanders, supra.[15] As in *Gray*, there is here an indirect debasing or diluting of a citizen's vote; where one person's vote counts for more than another's depending upon his place of residence. The common denominator in *Baker, Gray, Reynolds*, and the case at bar is that in each instance there is a lack of equal representation for equal numbers of people. The clear lesson of these cases is that an indirect debasing or diluting of a citizen's vote, whether the scheme is simple or sophisticated, will be condemned, the same as it has been in the past when done directly by ballot box stuffing (*Ex parte Siebold*, 100 U.S. 371); vote fraud (*United States v. Mosely*, 238 U.S. 383); or by a complete denial of the right to vote (*Nixon v. Herndon*, 273 U.S. 536). As Chief Justice Warren stated in the opinion of this Court in *Reynolds*:

> "* * * (T)he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (377 U.S. p. 555).

Justice Douglas' statement in the opinion of this Court in *Gray* is equally pertinent:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever

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[14] Continued—

appeal was dismissed in a memorandum opinion for want of a substantial federal question, 339 U.S. 940, 7 days after the Supreme Court handed down the *South v. Peters*, 339 U.S. 959, decision which reiterated previous decisions that apportionment matters were not justiciable. Obviously, *Tedesco* followed *South v. Peters*, and the reversal of *South v. Peters* in *Baker v. Carr*, and *Gray v. Sanders* would have the same effect on *Tedesco*. See also *Port Jefferson v. Board of Supervisors*, 256 N.Y.S. 2d 34 (Sup. Ct. 1964) where the trial court refused to order reapportionment "in view of the lack of appellate court precedent in New York State." In view of the appellate court decisions in the New York State courts and the *Bianchi* case all since 1964 the reason for such hesitancy is gone. *Avery v. Midland County* 406 S.W. 2d 422 (Tex. 1966) (County Court [Board] Supervisors) also relying on *Tedesco*; and *Moody v. Flowers*, 256 F. Supp. 195 (D.C.M.D. Ala. 1966) (County Board of Revenue & Control) Probable juris. noted, 87 S. Ct. 507 (1966).

[15] Judge Fox states that the "local boards elect intermediate (county) boards of education in accordance with a system paralleling the county-unit system invalidated by the Supreme Court in *Gray v. Sanders*." (R. 201)

their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home be in that geographical unit. This is required by the equal protection clause of the Fourteenth Amendment." (372 U.S. p. 379).

And as Chief Justice Warren emphasized in *Reynolds*:

"* * * (T)he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. * * *" (377 U.S. pp. 560-561).

This constitutional concept of "equal representation for equal numbers of people" cannot be satisfied by the argument advanced by the appellees that since appellants do not have the constitutional or statutory right to vote for county school board members no constitutional issue of equal protection is presented.[16] The insidiousness of that position cannot remain unchallenged. In sum, the appellees represent to this court that a so-called "elective system", spawned, nurtured and rigged to foster and advance the self interests of a minority which emasculates the rights and properties of the majority, must remain immune from the inspection by this court because the elective process is not secured to them under the provisions of the Constitution and statutes of the state. Obviously, the fate of the appellants would be far better served in the hands of an enlightened, appointed board or an executive whose motivation was to serve the interests of all people alike. For the last decade the appellants have been the victims of the conduct of an oligarchy and when they ask for equality they are told that the 1/2000th of a vote they have is more than the law guarantees to them. This oversimplification, which is just a legalism to deny rights to citizens, overlooks the fact that the equal protection clause is intended to do far more than to protect the *act* of voting or *casting* a ballot. The equal protection clause guarantees equal

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[16] Page 9, Appellees' Motion to Dismiss.

representation for equal numbers of people and any scheme or device to the contrary, no matter how simple or sophisticated must fall. Georgia was not, constitutionally, required to provide a primary election system for nomination of Democratic candidates for various state-wide offices. Nomination by state convention would obviously be constitutional. Or, constitutionally speaking, the offices could be filled by appointment. But once an election is provided, equal protection must be accorded; invidious discrimination based upon residence within the geographical unit will not be tolerated (*Gray v. Sanders, supra*).

In Tennessee, constitutionally speaking, there is no mandate that there be a state house of representatives; a unicameral legislature would be constitutional; as would election at large of the house members. But once an elective representative body is provided for, elected from districts, invidious discrimination by varying the size of the districts is a denial of equal protection of the laws (*Baker v. Carr, supra*). Likewise in Michigan, constitutionally speaking, there is no obligation to create county school districts; their responsibilities could be handled by appointed officials; but once these functions are given to an elected body purporting to represent a certain geographical unit, the election system devised cannot invidiously discriminate because of race, sex, occupation, income or location of one's home within the geographical unit (*Gray v. Sanders, supra*, p. 379). A system which does not provide equal representation for equal numbers of people regardless of the method used to accomplish the result is unconstitutional. *Baker, Gray and Reynolds* establish that substance not form is important when constitutional rights are involved. The method used in electing county school board members, *in substance*, has the same resulting invidious discrimination condemned in these three cases and the form by which this is accomplished is unimportant.

Appellees' assertion that Michigan conferred no "constitutional or statutory absolute right to vote" for county school board members has been completely answered by this Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The individuals there involved likewise had no "constitutional or statutory absolute right" to remain as residents of the City of Tuskegee, yet the scheme or devise used

to exclude them from the city boundaries was invalidated (p. 347):

> "When a state exercises power wholly within the domain of state interest it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

In *Gomillion* the federally protected right was against discrimination based on race or color (Fifteenth Amendment);[17] here the federally protected right is equal protection and against invidious discrimination (Fourteenth Amendment).[18]

The entire three judge panel at the District Court level had no difficulty seeing through form to the substance. The court below rejected these arguments of appellees when all three judges agreed that the primary question was one of whether or not *Gray v. Sanders* applied to the local level of government. The majority, below, was reluctant to so hold without clearer direction from this Court.

We wish to make our position crystal clear. We do *not* claim that all county-unit systems are unconstitutional *per se*. Rather, we only claim that a county-unit system which awards one unit vote to each local school district area within the county, irrespective of population, and where 99 people in one local school district area have the

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[17] It should be noted that Justice Whittaker concurred in *Gomillion* on the ground of equal protection under the Fourteenth Amendment, rather than the Fifteenth.

[18] Also see the recent Minnesota case of *Hanlon v. Towley*, Minn., 142 N.W. 2d 741 (1966), where the same argument as to "no absolute right to vote" at the local level of government was emphatically rejected by the Supreme Court of Minnesota by reference to *Gomillion* and the following rationale (p. 746 of 142 N.W. 2d):

> "While it appears to be well within the power of the legislature under Minn. Const. art. 11 to withdraw county government from electoral control and appoint or otherwise designate municipal officials ex officio to exercise the powers delegated to the county without running afoul of the equal protection clause, so long as the present system of a representative form of government is maintained, the fundamental nature of the right to vote inescapably requires the application of fundamental principles. Although not urged by appellants, the fact that the right to vote is granted by statute rather than by our constitution is a distinction without constitutional significance. Once granted, it becomes a fundamental right indigenous to self-government and preservative of other civil and political rights, including the right to equal representation. * * *"

same voice in county school board affairs as 201,000 people from another local school district area, is a denial of equal representation for equal numbers of people and hence a denial of equal protection and is unconstitutional.

This Court's recent decision in *Fortson v. Morris*, 87 S. Ct. 446 (1966) exemplifies the distinction we make. In *Fortson* the majority of this Court held that it was constitutional for the General Assembly of Georgia to elect the governor of the state even though the General Assembly was malapportioned since it was a *de facto* body. This Court held (p. 449, of 87 S. Ct.):

> "* * * Its duty now, under Article V of its Constitution, is to proceed to have the General Assembly elect its Governor from the two highest candidates in the election, unless, as some of the parties contend, the entire legislative body is incapable of performing its responsibility of electing a Governor because it is malapportioned. But, this is not correct. In Toombs v. Fortson, 384 U.S. 210, 86 S.Ct. 1464, 16 L. Ed.2d 482, affirming 241 F.Supp. 65, we held that with certain exceptions, not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution. * * *"

Implicit in this holding is that the body choosing the governor must be a properly apportioned representative body elected in a manner in which there is equal representation for equal numbers of people, or at least be *de facto* pending reapportionment. To equate *Fortson v. Morris* to the system allowed to stand by the lower court herein, would be to approve, without any obligation to reapportion, a system whereby all the county clerks in Georgia would meet and choose the governor. Such a system has the same diluting and debasing effect on a citizen's vote as the systems condemned in *Baker*, *Gray* and *Reynolds*, and would permit minority control.

This problem was analyzed by District Judge Fox, in dissent, below as follows (R. 214):

> "* * * This is not a situation in which the legislature has appointed a commission or board — no one is contending for a right to vote for appointed officials. The legislature has not chosen to appoint Boards for each of the Intermediate School Districts in the State of Michigan, in which case the function of providing for public education would be delegated, but not, legislatively speaking, the responsibility. For in that situation, the legislature would have delegated the function of providing for public education, but the appointees would have been directly responsible to the legislature, an equally apportioned body directly responsible to the people.
>
> "But here the legislature has delegated not only the function, but also the responsibility, which would not be objectionable but for the gross malapportionment in the existing system of selecting the Board. * * *"

The 40 member body composed of one local school board member from each school district which chooses or elects county school board members in Michigan is hardly the *de facto* body under orders to reapportion which was involved in *Fortson v. Morris, supra;* and hardly the "equally apportioned body directly responsible to the people" referred to by Judge Fox. Analyzed in the framework of *Fortson v. Morris, supra,* we seek either to have this 40 member body, which does the choosing or electing,[19] reapportioned to provide equal representation for equal numbers of people or an injunctive order enjoining the enforcement and operation of Section 294 and 294a of the Michigan School Code and requiring popular election of

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[19] This 40 member body also has the duty, annually, of approving the budget. C.L. '48 §340.298a, M.S.A. §15.3298(1) provides in part as follows:

> "* * * On or before March 1 of each year the board shall submit such budget to a meeting of 1 school board member named from each constituent school district to represent such a district. * * *"

county school board members.[20] Equal protection of the laws requires no less.[21]

To hold that equal protection principles of one person, one vote apply to a county board of supervisors, while attempting to distinguish the holding below on the ground that the county board of education involved "governmental agencies of special or limited power and jurisdiction", as a three-judge District Court recently did in *Martinolich v. Dean*, 256 F. Supp. 612, 615 (D.C.S.D. Miss. 1966); or to

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[20] Sections 294b and 294c of the Michigan School Code, C.L. '48 §§ 340.294b 340.294c, M.S.A. §§ 15.3294(2), 15.3294(3), authorize popular election of county school board members upon a favorable referendum vote within the county. See Appendix E, p. 6a for the full text of Sections 294b and 294c. These provisions for popular election are meaningless since a minute minority can thwart the calling of a referendum vote thereby perpetuating minority control. Note Judge Fox's analysis (R. 215):

> "The procedure outlined in M.S.A. 15.3294(2) and (3) is constitutionally unacceptable, requiring as it does that a majority of constituent school districts, representing more than 50% of the children on the last school census in the county district, must adopt resolutions in favor of such a procedure. The problem with this plan is that the Grand Rapids School District, with 48.04% of the school-age children in the Kent Intermediate School District, and 55.6% of the total population, would need the votes of nineteen other school districts (there being a total of 39 in Kent County) to bring about a popular election. Thus again, patently, a small minority has effective power to frustrate the will of the great majority."

[21] At least one state has recognized that a system for electing county school committee members, similar to the system in Michigan for election of members of the county school boards, must take into consideration the principles of equal representation. Under the Pennsylvania School Reorganization Act, (Pa. Stat. Ann. Tit. 24 § 2-202 et seq.) provision is made for all of the school directors of the county to meet for the purpose of electing an interim operating committee to be composed of nine of their number. The Reorganization Act specifically provides that (§ 3-303.1[b]) "in selecting (the members of) the interim operating committee, the incumbent school directors shall take into consideration the principle of proportionment representation according to population." In *Elberti v. Knasmen*, 254 F. Supp. 870 (D.C.E.D. Penn. 1966) plaintiffs claimed that the malapportionment resulting from Blanche Township, with a population of 1,747, having two members on the interim committee, in contrast to the Borough of Minersville, with a population of 6,961 and 50.7% of the total unit population in the county, also having only two members on the interim committee, was a violation of the equal protection clause of the Fourteenth Amendment. The Court agreed and held on page 872:

> "The present case is not one where the convention of incumbent school directors considered population along with other legitimate factors. Rather, it is a situation where the convention ignored the mandate of the statute requiring it to 'take into consideration the principle of proportionment representation according to population.'
>
> "Such a palpable disregard of the statute denying the people of Minersville its proper voice in school affairs works irreparable harm and gives rise to equitable relief."

argue that since some of the functions of county school boards are administrative and quasi-judicial and not exclusively legislative in character and that therefore equal protection should not apply as Circuit Judge Phillips did in his dissenting opinion in *Strickland v. Burns*, 256 F. Supp. 824, (D.C.M.D. Tenn. 1966) at 836, is to engage in technical distinctions having little meaningful significance. As District Judge Miller stated in his concurring opinion in *Strickland v. Burns*,[22] a 2-1 decision applying one man-one vote principles to the Rutherford County School Commission of Tennessee:

> "It is fruitless, in my view, to pursue the elusive distinction between legislative and administrative functions. Many attempts have been made to draw the distinction in varied contexts. But whatever value the dichotomy may have for some purposes to rationalize a particular result, I am convinced that it is inapposite here. So long as a subordinate body is vested with significant and important powers of government, whether they be labelled legislative, or administrative, or both, I can see no reason why it should be permissible under the equal protection clause for a state arbitrarily to debase the value of one person's vote in favor of another. I think that the powers and duties vested by state law in the Rutherford County School Commission are both significant and important. If the General Assembly of Tennessee sees fit to provide that the membership of such a body shall be chosen by popular vote, invidious discriminations between voters should be condemned under the 'one man, one vote' rule."

While advocates seek to project fine line distinctions between judicial and legislative functions, either as prescribed or exercised, the rights and properties of the appellants are perverted and/or expropriated by the county board. While the county board accomplishes this in the name of "education" they act in self interest (R. 129).

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[22] 256 F. Supp. p. 836.

That the equal protection clause of the Fourteenth Amendment proscribes activity by agencies of the state as well as the state itself is clear. As this Court stated in *Standard Computing Scale Company v. Farrell*, 249 U.S. 571, 577:

> "For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

And in *Cooper v. Aaron*, 358 U.S. 1 (1958) at 17:

> "(T)he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action. * * * or whatever the guise in which it was taken. * * *"

For other decisions holding that equal protection applies at every level see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, p. 68; *Yick Wo v. Hopkins*, 118 U.S. 356, p. 374.

The appellants in this case are not merely idealists bent upon implementing validly stated concepts of democracy. They are the victims of a vicious perversion of representative government, blatantly displayed in public session. A board member whose school district had filed a petition to further dismember the appellant school district actively participated in the emasculation of appellant district (R. 129). It was this series of shocking events that gave impetus to appellants to turn to the federal court for protection. It was the result of this glaring demonstration of action taken in contravention of the equal protection clause that plaintiffs sought to be protected from a transfer of their properties to another school district (R. 9). And, it was the illegal action of the improperly constituted county board which was busily dividing up the Grand Rapids School District as spoils of battle which prompted the intervening plaintiffs to pray that the transfer be declared null and void (R. 97).

The defendants have heretofore agreed that the court is faced with a determination of the constitutionality of an alleged malapportioned board and of the action it had taken on February 25, 1963 (R. 197).

The defendant county board has not received a *de facto* status as did the Georgia Assembly (*Fortson v. Morris, supra*, page 449). It is contended that the 2,000 to 1 voting disparity and the conduct of the county board does not entitle it to any such reprieve. Accordingly, appellants are entitled to a reversal of the action by the county board (*Fortson v. Morris, supra*, pages 449-452 and pages 453-454).

This Court has returned democracy to millions of people in this country in the functioning of state government in its holdings in *Baker, Gray* and *Reynolds*. There is no logic in abandoning majorities to the will of minorities at the local level. Frustration of the will of majorities where the people can function most effectively in the solution of their problems on a day to day basis will merely result in ineffective local government yielding to more federal control.

The reasoning of the majority in its opinion does not involve a refusal to recognize the logic or realities of appellants' claims. As stated by Judge Kent:

> "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. * * *" (R. 221-222).

Appellants submit that now is the time for a meaningful mandate to the District Courts to logically implement *Baker, Gray* and *Reynolds*.

CONCLUSION

Appellants seek the following relief:

(1) That Section 294 and 294a of the Michigan School Code be held invalid and unconstitutional by virtue of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;

(2) That the transfer resolution of February 25, 1963 adopted by the appellee, The Board of Education of the County of Kent, be held void and a complete nullity and of no force and effect;

(3) That an injunctive order issue requiring that in all subsequent elections for county school board members the representative of each local school district area be awarded a weighted vote based upon said local school district area's share of the total population of the county;

(4) In the alternative to paragraph (3), that an injunctive order issue requiring popular at-large elections on a one person-one vote basis of county school board members;

(5) In the alternative to paragraphs (3) and (4), that an injunctive order issue requiring that the 40 member body which elects county school board members be elected from districts containing populations of "substantial equality"; and

(6) That the judgment below be reversed and the cause be remanded to the District Court.

Respectfully submitted,

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